Supreme Court, U.S.
FILED

99 1083 DEC 27 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY HULL,

Petitioner,

v.

RICHARD H. FALLON, M.D., and
PRUDENTIAL HEALTHCARE SYSTEM, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH K. VUYLSTEKE *
FOX & VUYLSTEKE
ONE MERCANTILE CENTER
SUITE 2307
ST. LOUIS, MO 63101
(314) 421-1900

Attorney for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

3 cpp

QUESTION PRESENTED

Two provisions of ERISA are being interpreted by lower courts as pre-empting state malpractice laws. This Court is currently reviewing conflict pre-emption under ERISA §514(a) in *United States Healthcare Systems of Pennsylvania, Inc. v. Pennsylvania Hospital Insurance Co. and the Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund,* Supreme Court No. 98-1836. *(United States Healthcare Systems).* This case involves the other provision, "complete pre-emption" under §502(a).

> Does §502(a) of ERISA pre-empt a state malpractice claim against an ERISA-governed health plan and its medical director, if that claim is based on a decision by the health plan that a particular procedure is not "medically necessary"?

PARTIES TO THE PROCEEDING

Petitioner

Jeffrey D. Hull is a private citizen. Mr. Hull is an individual and has no corporate affiliations.

Respondents

Richard H. Fallon, M.D., Prudential Health Care System, Inc., Prudential Health Care System, Inc., d/b/a Prudential Health Care Health Maintenance Organization, Prudential Health Care System, Inc., d/b/a Prudential Health Care System, St. Louis Health Care Management; Prudential Health Care System, Inc., d/b/a Prudential Health Care Health Maintenance Organization, a/k/a Prucare, HMO; Prudential Insurance Brokerage, Inc., d/b/a Pruco Life Insurance Company, The Prudential Insurance Company of America, The Prudential Insurance Company of America, d/b/a Prudential Insurance and Financial Services, The Prudential Insurance Company of America, d/b/a Prudential Health Care System, St. Louis Health Care Management the Prudential Insurance Company of America, d/b/a Prudential Health Care Health Maintenance Organization; Prudential Insurance Company of America, d/b/a Prudential Healthcare Health Maintenance Organization, a/k/a Prucare, HMO, and Pruco Securities Corporation.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Petition 4

I. Comparing 502(a) and 514(a) Pre-emption 4

II. The Decision Below Conflicts With This Court's Decisions Construing §502(a) of ERISA And With The Third Circuit's Decisions On The Same Issue 5

III. This Court's Review Is Needed To Bring Clarity To The Scope Of Both Pre-emptive Provisions of ERISA 8

Conclusion 10

Appendix

Appendix A
Court of Appeals' Opinion - 8/23/99 . . . . . 1a
Appendix B
District Court Memorandum and Order - 8/18/98 . . . . . 9a

Appendix C
Court of Appeals Order Denying Petition for Rehearing and for Rehearing En Banc - 10/7/99 . . . . . 17a

TABLE OF AUTHORITIES

CASES

California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc., 519 U.S. 316 (1997) 6, 7

Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992) 9

Dukes v. U.S. Healthcare, Inc., 573 F.3d 350 (3rd Cir.), *cert. denied*, 516 U.S. 1009 (1995) . . . . . *passim*

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S.1 (1983) 4

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 5

In Re U.S. Healthcare, Inc., 193 F.3d 151 (3rd Cir.1999) . . . . . *passim*

Kuhl v. Lincoln National Health Plan, 999 F.2d 298 (8th Cir. 1993) *cert. denied*, 510 U.S. 1045 (1994) 8

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 4, 5

New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 6

Pilot Life Insurance v. Dedeaux,
481 U.S. 41 (1987) 4, 6

United States Healthcare Systems of Pennsylvania, Inc. v. Pennsylvania Hospital Insurance Co. and the Commonwealth of Pennsylvania Medical Professional Catastrophe Loss Fund,
Supreme Court No. 98-1836 . . . . . i, 8, 10

STATUTES AND REGULATIONS

28 U.S.C. §1254 1
28 U.S.C. §1291 1
28 U.S.C. §1331 1

Section 502(a) of Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a) 1, 2, 5

Section 514(a) of Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a) 4, 7

U.S. Constitution, Article VI cl.2 2

MISCELLANEOUS

W. Mariner, *Liability for Managed Care Decisions: The Employee Retirement Income Security Act (ERISA) and the Uneven Playing Field,*
86 American Journal of Public Health
No. 6 (June, 1996) 9

Note, *ERISA Pre-emption: Immunity for HMOs,*
(1998) U.Ill.L.Rev. 199 . . . . . 9, 10

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 188 F.3d 939. App. la-8a. The Opinion of the District Court for the Eastern District of Missouri is not published. It is included in Appendix at 9a-16a. The denial of the Petition for Rehearing En Banc and Petition for Rehearing by the panel dated October 7, 1999, by the United States Court of Appeals, Eighth Circuit, is printed in the Appendix at 17a.

JURISDICTIONAL STATEMENT

The District Court assumed jurisdiction of this action pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1132(a).

An appeal was taken to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. The judgment in the Court of Appeals was entered August 23, 1999. Petitioner filed a Petition for Rehearing by the panel, or, in the alternative, for rehearing en banc. The Court of Appeals denied the Petition on October 7, 1999.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides that the laws of the federal government "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding." U.S. Const., art. VI, cl.2.

ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B) provides:

> (a) A civil action may be brought -
>
> (1) By a participant or beneficiary -
>
> (A) * * * *
>
> (B) To recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .

ERISA §502, 29 U.S.C. §1132 further provides that:

> State courts have competent jurisdiction and District Courts of the United States shall have concurrent jurisdiction of any action under subsection (a)(1)(B) of this section.

STATEMENT OF THE CASE

Petitioner, Jeffrey Hull, commenced this action in Missouri state court in January, 1998. His petition alleged medical malpractice against respondent Prudential's medical director, Richard H. Fallon, M.D., and vicarious liability for said negligence against Prudential Health Care Systems, Inc., and other Prudential organizations (Prudential). All claims against Prudential were based on the theories that Dr. Fallon was acting as an ostensible agent, servant, or employee of Jeffrey Hull's health insurance plan and challenged the quality of care Mr. Hull actually received.

Fallon and Prudential removed the action to the United States District Court for the Eastern District of Missouri. Fallon and Prudential recharacterized plaintiff's complaint alleging that it had been artfully pleaded because Dr. Fallon had never entered into a doctor-patient relationship with Jeffrey Hull. Respondents alleged they were only administering benefits on behalf of an ERISA plan. Based on that recharacterization, they alleged plaintiff was really bringing an action to recover benefits under §502(a) of ERISA and therefore federal jurisdiction was pre-emptive and exclusive.

All of Petitioner's claims center around the health plan medical director's judgment that a sophisticated heart test was not "medically necessary" and as a result of this decision Jeffrey Hull is now permanently disabled. The District Court agreed with respondents' recharacterization of Hull's claim and denied Petitioner's Motion for Remand and granted the dismissal of Hull's claim as pre-empted under §502(a) of ERISA. The Eighth Circuit affirmed that judgment.

REASONS FOR GRANTING THE PETITION

I. Comparing 502(a) and 514(a) Pre-emption

There is a difference between complete pre-emption under ERISA §502(a) and conflict pre-emption under ERISA §514(a) 29 U.S.C. §1144(a). Complete pre-emption under ERISA §502(a) is an exception to the well-pleaded complaint rule and has jurisdictional consequences since it recharacterizes state law claims as claims arising under federal law. *See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 64-67 (1987).

Conflict pre-emption under ERISA §514(a), however, does not recharacterize claims as arising under federal law. Rather, preemption under ERISA §514(a), serves as a defense to a state law claim. (*Compare Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 52-56 (1987) that examines the scope of pre-emption under ERISA §514(a) with *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 64 which states that ERISA pre-emption under §514(a) "without more, does not convert a state claim into an action arising under federal law.")

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 23, 27 (1983) holds that pre-emption under ERISA §514 does not permit a defendant to remove a suit from state court to federal court when the plaintiff's state claim does not fall within the scope of §502. Therefore, to determine whether Dr. Fallon and Prudential properly removed this action to federal court, this Court must determine whether any of Hull's claims fit within the scope of §502(a).

Federal courts have concurrent jurisdiction with state courts over individual claims for benefits under the terms of

an employee benefit plan, but federal courts alone have exclusive jurisdiction over all other claims authorized by ERISA §502(a); ERISA §502(a), 29 U.S.C. 1132(a) In order to remove a state law claim, that claim must be displaced by ERISA's civil enforcement provisions under §502(a). *Ingersoll-Rand v. McClendon,* 498 U.S. 133 (1990).

If the state law claim cannot be brought under ERISA's civil enforcement provisions, then there is no federal question jurisdiction under ERISA and removal is improper unless the claim is properly recharacterized as a state law complaint displaced by §502(a)(1)(B) as an action arising under federal law. *See, Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987).

II. The Decision Below Conflicts With This Court's Decisions Construing §502(a) Of ERISA And With The Third Circuit's Decisions On The Same Issue.

In it's decision below, the Eighth Circuit ignored recent Supreme Court decisions relating to this question and decided Mr. Hull's claim was completely pre-empted by §502(a) of ERISA. This ruling is also in conflict with the Third Circuit on this issue as set forth in *Dukes v. U.S. Healthcare, Inc.,* 57 F.3d 350 (3rd Cir. 1995, *cert. denied,* 516 U.S. 1009 (1995) and *In Re U.S. Healthcare, Inc.,* 193 F.3d 151 (3rd Cir. 1999). In both *Dukes* and *In Re U.S. Healthcare,* the Third Circuit held that the delay or denial of a medically necessary procedure by an HMO constituted, in effect, a "discretionary medical decision rather than an administrative one" and therefore was not subject to federal pre-emption. *In Re U.S. Healthcare, Inc.,* 193 F.3d 151, 164

(3rd Cir. 1999); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d, 350, 358 (3rd Cir. 1995).

This Court gave ERISA pre-emption a broad reading in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). That decision was relied on by the Eighth Circuit in their decision below. However, the Eighth Circuit erred in failing to note this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). In *Travelers*, the Court cautioned "nothing in the language in the ERISA or in the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 514 U.S. at 661.

Subsequent cases to *Travelers* have continued this trend. In *California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.*, 519 U.S. 316 (1997) a majority of this Court relied on *Travelers* to find that a California prevailing wage law was not pre-empted by ERISA. A cogent concurrence authored by Justice Scalia and joined by Justice Ginsberg recognized that the scope of ERISA pre-emption had been narrowed.

> I think it would greatly assist our function of clarifying the law if we simply acknowledge that our first take on this statute was wrong; that the "relate to" clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption but rather to identify the field in which ordinary *field pre-emption* applies - namely the field of laws regulating "employee benefit plans [as] described in §1003(a) of this title and not exempt under §1003(b) of this

title" 29 U.S.C. §1144(a). *Dillingham,* 519 U.S. at 335

The Third Circuit has followed the *Travelers'* line of reasoning.

> When the HMO acts under the ERISA plan as a health care provider, it arranges and provides medical treatment, directly through contracts with hospitals, doctors, or nurses . . . in performing these activities, the HMO is not acting in its capacity as a plan administrator, but as a provider of health care, subject to the prevailing state standard of care. *In Re U.S. Healthcare Inc.,* 198 F.3d at 162.

The Third Circuit also followed this Court's reasoning in *Dillingham* where this Court stated:

> Indeed, if ERISA were concerned with any state action such as medical-care quality standards or hospital workplace regulations - that increased costs of providing certain benefits, and thereby potentially affected the choice made by ERISA plans, we could scarcely see the end of ERISA's pre-emptive reach, and the words "relate to" would limit nothing. 519 U.S. at 329.

Like the plaintiffs in *Dukes* and *In Re U.S. Healthcare, Inc.,* Jeffrey Hull phrased his claim as a denial of the *quality* of medical care he was provided.

III. This Court's Review Is Needed To Bring Clarity To The Scope Of Both Pre-emptive Provisions Of ERISA

This case contrasts sharply with the fact pattern in *United States Healthcare Systems,* Supreme Court No. 98-1836. That case does not involve a determination by a health plan of "medical necessity". There is no dispute Mr. Pappas needed to be transferred for emergency surgical intervention. In Jeffrey Hull's case, the health plan medical director, who never saw or examined Hull, twice disagreed with the primary care physician as to the appropriate diagnostic medical test for Hull's heart condition.

Both *United States Healthcare Systems,* and *Kuhl v. Lincoln Nat. Health Plan,* 999 F.2d 298 (8th Cir. 1993) are examples of standard "coverage" cases as opposed to "medically necessary" (also known as "utilization review"). Coverage decisions involve resolution of simple contractual issues such as: Can a patient be transferred to an "out-of-network" hospital? Or: Can the patient be treated by a "non-plan" physician?

Jeffrey Hull's case represents the other common area where ERISA plans avoid liability for negligent decisions. By making prospective determinations regarding payment for a particular medical procedure, ERISA plans, in effect, are practicing medicine.

> By its very nature, a system of prospective decisionmaking influences the beneficiary's choice among treatment options to a far greater degree than does a theoretical risk of disallowance of a claim facing a beneficiary in a retrospective system. Indeed, the perception

> among insurers that prospective determinations result in lower health care costs is premised on the likelihood that a beneficiary, faced with the knowledge of specifically what the plan will and will not pay for, will choose the treatment option recommended by the plan in order to avoid risking total or partial disallowance of benefits. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1332 (5th Cir. 1992)

Though Jeffrey Hull's claim would not be pre-empted if it was venued in the Third Circuit, commentators have recognized the distinction between the "quality of care" and "denial of benefits" created by *Dukes* and *In Re U.S. Healthcare, Inc.*, is a false one. Under that distinction, "a pre-emption defense will fail as long as medical care is actually delivered, regardless of how poor in quality. Ironically, the pre-emption defense will succeed when necessary care is not delivered at all." Note: *ERISA Pre-emption: Immunity For HMOs,* (1998) U.Ill.L.Rev. 199, 223.

Furthermore, the Third Circuit's conclusion is ultimately troubling. "If a patient receives such poor care that it amounts to a denial of benefits, then ERISA may well pre-empt any claim of malpractice. This is likely to leave the most severely injured plaintiffs without any remedy if they belong to an ERISA plan". W. Mariner, *"Liability for Managed* Care *Decisions: The Employee Retirement Income Security Act (ERISA) and the Uneven Playing Field".* 86 American Journal of Public Health No.6 (June, 1996).

Finally, the Third Circuit's distinction is imperfect because it fails to take into account the multiple roles in health care played by HMOs. Instead, it promotes a separation between HMOs acting as reviewers of medical decisions, and

those who, in effect, assume the role of medical providers. "Considering the many configurations an employee health plan may take and the interrelated nature of cost containment and medical decision making in today's health care environment, the distinction forges antiquated definitions and models of health care delivery on a system that has outgrown them." Note: *ERISA Pre-emption: Immunity For HMOs,* (1998) U.Ill.L.Rev. 199, 223.

Medicare and Medicaid patients can sue their HMO for malpractice under state laws. Governmental health plans are excluded from ERISA pre-emption as well. "Since pre-emption claims turn on Congress' intent", *Travelers,* 514 U.S. at 655, this Honorable Court should hestitate to conclude Congress intended only non-governmentally employed people and their familes be deprived protection of state medical malpractice laws.

CONCLUSION

This is a simple straightforward case. It provides this Court an opportunity to decide whether patients in this country "enjoy the right to be free from medical malpractice regardless of whether . . . care is provided through an ERISA plan. *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 358 (3rd Cir. 1995); *In Re U.S. Healthcare, Inc.*, 193 F.3d 151, 161 (3rd Cir. 1999). By deciding this case along with *United States Healthcare Systems,* Supreme Court No. 98-1836, the Court will have a full and complete factual record to resolve

the difficult issues of statutory construction relating to both pre-emption provisions of ERISA.

Respectfully submitted,

KENNETH K. VUYLSTEKE
Counsel of Record
FOX & VUYLSTEKE
One Mercantile Ctr., Suite 2307
St. Louis, MO 63101
(314) 421-1900

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed: August 23, 1999]

No. 99-1036

Appeal From The United States District Court
For The Eastern District Of Missouri

JEFFREY D. HULL,
Appellant,

v.

RICHARD H. FALLON, M.D., et al.,
Appellees.

BEFORE: BEAM and MORRIS SHEPPARD ARNOLD, Circuit Judges, and KYLE,[1]

OPINION: BEAM, Circuit Judge.

Jeffrey Hull filed a medical malpractice action in state court against the administrator of his health plan and asserted

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, sitting by designation.

vicarious liability on the part of his health care plan for the claim. The defendants removed the action to federal court claiming federal question jurisdiction under ERISA[2] and preemption of the state law claims. Hull moved to remand the case back to state court. The district court[3] held that appellant's state law claims were preempted by ERISA, and, as pleaded, failed to state a cause of action under ERISA. The defendants' motion to dismiss was granted. We affirm.

I. BACKGROUND

Jeffrey Hull was an employee of Prudential Insurance Company, and participated in a health insurance plan issued by Prudential Health Care Plan, Inc. (the Plan), an employee welfare benefit plan under ERISA. *See 29 U.S.C. § 1002.* In January 1996, Hull went to Dr. Delcau, his primary care physician, complaining of shortness of breath, chest pain, and arm pain. Dr. Delcau was a member physician of the Plan. Hull alleges that on two occasions, once in January, and again in February, Dr. Delcau contacted Dr. Fallon, the Plan's administrator, regarding his diagnosis and treatment plan for Hull, requesting authorization to administer a thallium stress test. Dr. Fallon denied both requests for a thallium stress test and instead authorized a treadmill stress test. Hull claims that, as a result of the denial of the thallium test, he suffered

---

[2] Employee Retirement Income Security Act, *29 U.S.C. §§ 1001 et seq.*

[3] The Honorable Rodney W. Sippel, United States District Judge for the Eastern District of Missouri.

a myocardial infarction and developed additional heart disease.

As indicated, Hull filed a medical malpractice action in state court, alleging that Dr. Fallon, the Plan administrator, failed to exercise a sufficient degree of care in diagnosing and treating hint Hull also claims that the Plan is vicariously liable for Dr. Fallon's alleged negligence. Fallon and the Prudential defendants filed a notice of removal to federal district court pursuant to *28 U.S.C. § 1441*, arguing that Hull's claims were preempted by ERISA, thus creating federal question jurisdiction. They also filed a motion to dismiss for failure to state a cognizable cause of action under ERISA. The district court found that Dr. Fallon was not acting a s a treating physician, but rather as a plan administrator, thus Hull's claims were based on a denial of benefits and could have been brought only under section 502(a) of ERISA (claims for denial of benefits),[4] and thus were preempted by federal law. The

---

[4] Section 502(a) provides in pertinent part:
A civil action may be brought -
(1) by a participant or beneficiary -
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
. . .
(3) by a participant, beneficiary, or fiduciary
(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter

district court further found that, as pleaded, Hull failed to state a claim cognizable under ERISA and granted Hull thirty days to amend his complaint. Hull did not file an amended complaint, but filed this appeal, asserting that his claims are not preempted.

II. DISCUSSION

Because there is not complete diversity between the parties, the district court could only have jurisdiction to consider the case if there is federal question jurisdiction. Federal question jurisdiction requires that the action arise "under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331.* Generally, an action arises under federal law only if issues of federal law are raised in the plaintiffs well-pleaded complaint. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 95 L.Ed. 2d 55, 107 S. Ct. 1542 (1987). An exception to this rule is the "complete preemption" doctrine. This doctrine provides that "to the extent that Congress has displaced a plaintiff's state law claim . . . a plaintiff's attempt to utilize the displaced state law is properly 'recharacterized' as a complaint arising under federal law." *Rice v. Panchal*, 65 F.3d 637, 640 n.2 (7th Cir. 1995). Thus, federal question jurisdiction exists - and the case may be removed to federal court - if Hull's state law claims arise in an area that has been displaced by ERISA.

ERISA is a comprehensive statute designed to promote the interests of employees by regulating the creation and

---

or the terms of the plan;
29 U.S.C. § 1132(a).

administration of employee benefit plans. Consistent with the decision to create a comprehensive, uniform federal scheme, Congress drafted ERISA's preemption clause in broad terms. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-138, 112 L.Ed. 2d 474, 1111 S. Ct. 478 (1990) ("deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern"). Congress preempted "all State laws insofar as they may now or hereafter relate to any employee benefit plan." *29 U.S.C. § 1144(a)*. The United States Supreme Court has concluded that suits under section 502(a) of ERISA present a federal question for purposes of federal court jurisdiction. *See Taylor*, 481 U.S. at 66. Causes of action within the scope of, or that relate to, the civil enforcement provisions of 502(a) are removable to federal court despite the fact the claims are couched in terms of state law. *See id.*; *Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298, 302 (8th Cir. 1993); *Rice*, 65 F.3d at 641. Not only does this complete preemption confer federal jurisdiction, it also limits claims and remedies exclusively to those provided by section 502(a). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987); *Kuhl*, 999 F.2d at 302.

The issue of jurisdiction in the district court is a question we review de novo. *See Wilson v. Zoellner*, 114 F.3d 713, 715 (8th Cir. 1997). Factual determinations made by the district court in addressing the jurisdictional questions are reviewed for plain error. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

The district court found that the gravamen of Hull's claims is that he was denied a thallium stress test.[5] We agree. Hull contends that his claim does not arise from his relationship with the Plan and the fact that it denied a requested benefit, but rather from a doctor-patient relationship between himself and Dr. Fallon, the Plan administrator. Other than responding to two calls from Dr. Delcau, Hull's treating physician, who called for authorization for the thallium test, Dr. Fallon had no relationship with Hull other than as the Plan administrator.

We addressed the same argument in a case with similar facts. In *Kuhl*, the patient's spouse brought an action asserting, among other claims, medical malpractice after the defendant plan canceled a surgery because it was scheduled at an out-of-network hospital. By the time the surgery could be rescheduled, the patient's health had deteriorated to the point that he was no longer a candidate for the procedure. *See Kuhl*, 999 F.2d at 300. Essentially, Kuhl's claims were based on the manner in which his plan responded to a request for authorization for the surgery. We held that the malpractice claim was preempted by ERISA, and agreed with the district court that "artful pleading by characterizing [the plan's] actions in refusing to pay for the surgery as 'cancellation' or by characterizing the same administrative decisions as

---

[5] In making this determination, the district court properly looked beyond the four corners of Hull's pleadings and considered the defendants' notice of removal to determine whether Hull, by artful pleading, sought to deny the defendants' right to a federal forum. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985).

'malpractice' does not change the fact that plaintiffs' claims are based on the contention that [the plan] improperly processed Kuhl's claim for medical benefits." *Id.* at 303.

In a case with even greater factual similarity, the Seventh Circuit reached the same result. *See Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996). In *Jass*, the plaintiff had a knee replaced. The utilization review coordinator (a registered nurse) for the defendant plan made a medical determination that rehabilitation was not necessary, and secured the patient's early release from the hospital without the needed therapy. As a result, the plaintiff suffered permanent damage. *See id.* at 1485. This injury, the plaintiff claimed, gave rise to a state law negligence claim not preempted by ERISA. The Seventh Circuit disagreed. The plaintiff "alleged that [the reviewing nurse] determined that said course of treatment was not medically necessary and then she proceeded to secure the discharge of the Plaintiff from the hospital. . . . This was a determination of benefits within the meaning of ERISA." *Id.* at 1489.

The district court found that Dr. Fallon, like the nurse in *Jass*, denied the thallium test as part of a determination of benefits owed by the Plan. We agree with the district court's reasoning and conclude that Hull's claims, like the claims advanced in *Kuhl* and *Jass*, are preempted by ERISA. In short, although Hull's characterization of his claims sound in medical malpractice, the essence of his claim rests on the denial of benefits. As a Plan participant, he could have brought an action under section 502(a). Because his claims relate to the administration of benefits, they fall squarely within the scope of section 502(a). Therefore, Hull's claims

are completely preempted by ERISA. Plan administrators necessarily exercise medical judgment in determining benefits due under the plan. To find that Hull's claims are not preempted would be to expose plan administrators to varying state causes of action for claims within the scope of section 502(a). This "would pose an obstacle to the purposes and objectives of Congress." *Pilot Life*, 481 U.S. at 52.

Hull does not appeal the district court's conclusion that his pleadings failed to present a cognizable cause of action under ERISA.

III. CONCLUSION

The judgment of the district court is affirmed.

/s/_____
JUDGE BEAM

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:98CV274 RWS

[Filed: August 18, 1998]

JEFFREY D. HULL,	)
Plaintiff,	)
	)
v.	)
	)
RICHARD H. FALLON, M.D., et al.	)
Defendants.	)
	)

MEMORANDUM AND ORDER

This matter is once again before the Court on Plaintiff's Motion to Remand [#14] and Defendants' Motion to Dismiss [#5].

The Court previously ordered defendants to supplement the record before the Court regarding plaintiff's

participation in an employer sponsored ERISA[1] plan at the time of the events alleged in his Complaint. The record as supplemented now establishes that plaintiff was in fact participating in an ERISA plan at the time he sought and was denied the treatment specified in his Complaint. As a result, plaintiff's state law claims are preempted by ERISA and removal to this Court was proper.

The question before the Court is then whether plaintiff's Complaint states a cognizable cause of action under ERISA. It does not, but, because the Court recharacterized plaintiff's claims, plaintiff will be granted leave to amend his Complaint to properly state an ERISA denial of benefits claim if he so desires.

I. Procedural History

Plaintiff Jeffrey Hull filed this action in St. Louis County Circuit Court naming Richard H. Fallon, M.D. the Medical Director of Prudential Health Care Plan, Inc., Prudential Healthcare System, Inc. and various other Prudential entities as defendants.

Hull alleged that the Prudential defendants, through the actions of defendant Fallon, failed to provide him with appropriate medical treatment. Specifically, plaintiff alleged that on two occasions, once in January and once in February of 1996, plaintiff's primary care physician, Dr. Carey Delcau, contacted defendant Fallon concerning Delcau's diagnosis,

---

[1] Employee Retirement Income Security Act of 1974 *29 U.S.C. § 1001 et seq.*

treatment plan and recommendation for a Thallium Stress Test. Dr. Fallon, who was the administrator for plaintiff's employee benefits plan denied both requests for the Thallium Stress Test, authorizing instead a Treadmill Stress Test. Plaintiff alleges that he suffered a myocardial infarction, an occlusion of the right coronary artery, and/or develop more coronary artery disease as a result of Dr. Fallon's refusal to authorize the Thallium Stress Test.

Hull and the Prudential defendants filed a Notice of Removal to this Court pursuant *28 U.S.C. § 1441* arguing Hull's state law claims were preempted by ERISA. Defendants also moved to dismiss the Petition asserting that Hull had failed to state a cognizable cause of action under ERISA.

Hull moved to remand the lawsuit to state court. Hull contends that his claims are not preempted by ERISA because they allege medical malpractice, not a denial of benefits under an ERISA plan.

Both plaintiff's Motion to Remand and the defendants' Motion to Dismiss are currently pending before the Court.

II. Legal Analysis

A. Motion to Remand

The evidence before the Court establishes that plaintiff's state law medical malpractice claims are preempted by ERISA because he was participating in an ERISA plan when Dr. Fallon, the administrator of that plan, declined to

authorize plaintiff's request for a Thallium Stress Test. Therefore, removal of the claims to this Court was proper.

As stated in this Court's prior July 17, 1998 Order, generally, a lawsuit may not be removed to federal court because of a federal question unless that question appears on the face of the "well-pleaded complaint." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). There is, however, an exception to the "well-pleaded complaint" rule. Id. When the area of state law, upon which the complaint is based, has been completely preempted by Congress the lawsuit may be removed to federal court. Id. This "complete preemption" doctrine extends to claims which are within the scope of ERISA § 502(a). Id.

Section § 502(a) provides:

A civil action may be brought -

1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; ...

29 U.S.C. § 1132(a).

The terms "participant" and "plan" as used in § 502(a) refer to an employee participating in an "employee welfare benefit plan" which is defined by ERISA § 3(1), 29 U.S.C. § 1002 as:

> ". . . any plan, fund or program which heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries though the purchase of insurance or otherwise, (A) medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, death or unemployment . . ."

29 U.S.C. § 1002.

The question of whether an ERISA plan exists and subsequently whether plaintiff was a participant is "a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1998); Harris v. Arkansas Book Co., 794 F.2d 358, 360 (8th Cir. 1986).

A review of the supplemental record filed by the defendants in this action reveals that Hull was in fact participating in an ERISA plan at the time his request for a Thallium Stress Test was denied. Defendants submitted the affidavit of Steven Michael Palesch who attested that Hull was an employee of Prudential Insurance Company of America in January and February of 1996. During that time, Hull

The terms "participant" and "plan" as used in § 502(a) refer to an employee participating in an "employee welfare benefit plan" which is defined by ERISA § 3(1), 29 U.S.C. § 1002 as:

> ". . . any plan, fund or program which heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries though the purchase of insurance or otherwise, (A) medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, death or unemployment . . ."

29 U.S.C. § 1002.

The question of whether an ERISA plan exists and subsequently whether plaintiff was a participant is "a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1998); Harris v. Arkansas Book Co., 794 F.2d 358, 360 (8th Cir. 1986).

A review of the supplemental record filed by the defendants in this action reveals that Hull was in fact participating in an ERISA plan at the time his request for a Thallium Stress Test was denied. Defendants submitted the affidavit of Steven Michael Palesch who attested that Hull was an employee of Prudential Insurance Company of America in January and February of 1996. During that time, Hull

participated in a plan sponsored by his employer that provided specified medical benefits to its employees. The plan was provided through a group contract issued by Prudential Health Care Plan, Inc. This testimony establishes that Hull participated in an "employee welfare benefit plan" under ERISA § 3(1), 29 U.S.C. § 1002.

The Court must then determine if Hull's claims could have been brought under ERISA § 502(a) and thus, are completely preempted. As set forth above, § 502(a) allows plan beneficiaries to recover for benefits due under the terms of the plan or to enforce or clarify their rights under the plan.

The Seventh Circuit has enumerated three factors which the Court should consider when determining if claims are within the scope of § 502(a): 1) whether the plaintiff is eligible to bring a claim under that section, 2) whether the plaintiff's cause of action falls within the scope of an ERISA provision that the plaintiff can enforce via § 502(a); and 3) whether the plaintiff's "state law claim cannot be resolved without an interpretation of the contract governed by federal law." Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1486 (7th Cir. 1996).

A review of all of these factors supports the conclusion that Hull's claims are really § 502(a) denial of benefits claims.

First, as a plan participant, Hull was entitled to bring suit under § 502(a).

Second, despite Hull's characterization of his claims as sounding in medical negligence, the essence of those claims is a denial of benefits which can be enforced under § 502(a).

Hull argues that he is not contesting a benefits determination but rather the level of medical care given to him by Dr. Fallon. Hull argues Dr. Fallon acted as a treating physician when he determined that Hull was not approved for a Thallium Stress Test.

The evidence does not support this assertion however. Dr. Fallon filed an affidavit with this Court detailing his involvement in the treatment of Hull. In that affidavit Fallon attested that he did not act as a treating physician for Hull. Further, Dr. Fallon testified that his sole contact with Hull's treatment was limited to making benefits determinations in his capacity as an administrator for Hull's medical plan. Dr. Fallon did not prescribe treatment for Hull, he merely identified what treatment would be paid for by Hull's benefits plan.

Hull's claims are more properly characterized as claims for denial of benefits. These types of claims fall within the scope of § 502(a) and can be enforced under that section.

Finally, Hull's claims cannot be resolved without interpreting the benefits contract. The benefits contract dictated the benefits that Hull was entitled to when he sought the Thallium Stress Test. Whether or not the actions of Dr. Fallon and the Prudential defendants were appropriate can only be determined in the context of the language in the benefits contract.

The evidence in the record before the Court establishes that Hull's claim is preempted by ERISA. Therefore,

defendants properly removed the lawsuit to this Court. Plaintiff's Motion to Remand will be denied.

B. Motion to Dismiss

As pointed out in Defendant's Motion to Dismiss, plaintiff's allegations as they are currently stated in plaintiff's Complaint do not state a cognizable cause of action under ERISA. Neither does plaintiff request relief which would be available to him under the statute. However, since this Court has recharacterized the nature of plaintiff's claim, plaintiff will be given leave to amend his Complaint to state a proper ERISA claim if he so desires.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion to Remand [#14] is DENIED.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss [#5] is GRANTED in part and DENIED in part. IT IS FURTHER ORDERED that plaintiff is granted thirty (30) days from the date of this Order in which to amend his Complaint to state a cause of action under 29 U.S.C. § 1001 et seq. If plaintiff fails to timely amend his Complaint, the cause of action against all defendants will be dismissed.

Dated this 18th day of August, 1998.

/s/_____
UNITED STATES DISTRICT JUDGE
RODNEY W. SIPPEL

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed: October 7, 1999]

No. 99-1036

JEFFREY D. HULL,
Appellant,

v.

RICHARD H. FALLON, M.D., et al.
Appellees.

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

October 7, 1999

Order Entered at the Direction of the Court:

/s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-1083

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JEFFREY HULL,
Petitioner,

v.

RICHARD H. FALLON, M.D., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS RICHARD H. FALLON, M.D., AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA IN OPPOSITION TO PETITION FOR CERTIORARI

RICHARD J. PAUTLER
Counsel of Record
LEWIS R. MILES
THOMPSON COBURN LLP
One Mercantile Center
St. Louis, MO 63101
Phone: (314) 552-6000

Attorneys for Respondents

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

BEST AVAILABLE COPY

CORPORATE DISCLOSURE

The Prudential Insurance Company of America is a mutual insurance company that has no publicly traded stock. It has no parent corporation or nonwholly-owned subsidiaries.

TABLE OF CONTENTS

CORPORATE DISCLOSURE i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

RESPONDENTS' STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION FOR CERTIORARI 3

I. No Conflict Exists Among the Circuits. 3

II. The Eighth Circuit Followed the Relevant Decisions of This Court. 7

III. There Is No Need for a Decision by this Court. ... 7

CONCLUSION. 8

TABLE OF AUTHORITIES

Cases

Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557 (1968) 3

California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc., 519 U.S. 316 (1997) 7

Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3rd Cir.), *cert. denied*, 516 U.S. 1009 (1995) 3, 5, 6

Gully v. First National Bank, 299 U.S. 109 (1936) 3

In re U.S. Healthcare, Inc., 193 F.3d 151 (3rd Cir. 1999) 4, 5, 6

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) 4, 5, 6, 7

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 3

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 3, 7

Rice v. Panchal, 65 F.3d 637 (7th Cir. 1995) 4, 5, 6, 7

Statutes

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, *et seq.* 1

ERISA § 502(a), 29 U.S.C. §1132(a) 2, 4, 6, 7

ERISA § 514(a), 29 U.S.C. §1144(a) 2, 7

RESPONDENTS' STATEMENT OF THE CASE[1]

Petitioner Jeffrey Hull ("Hull") was an employee of The Prudential Insurance Company of America ("Prudential") in 1996. As such, he had group health care coverage through a Plan issued by Prudential Health Care Plan, Inc. ("PruCare"). The Plan was a part of Prudential's employee welfare benefit plan as defined in the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001 *et seq.* ("ERISA"), and Hull was a "participant" in the Plan. Respondent Dr. Richard H. Fallon was a physician employed by Prudential as Medical Director for the Plan.

In January, 1996, Hull consulted Dr. Delcau, who is not employed by or otherwise connected with PruCare. Hull complained of chest pains and shortness of breath. Dr. Delcau considered the advisability of a thallium stress test, and he called Dr. Fallon to see if PruCare, through the Plan, would agree in advance to pay the costs of that procedure. Dr. Fallon refused on behalf of PruCare to agree to pay the costs of a thallium stress test for Hull. The Plan obligates payment only for those procedures that are "medically necessary," and Dr. Fallon did not believe that a thallium stress test was "medically necessary" within the meaning of the Plan.

Thereafter, in January 1998, Hull filed an action against Dr. Fallon, Prudential, and PruCare[2] in the Circuit Court for St. Louis County, Missouri. He alleged that Dr. Fallon's refusal to precertify benefits for a thallium stress test constituted medical malpractice, as a result of which he had suffered a myocardial

---

[1] Hull's "Statement of the Case," Petition for Certiorari, page 3, does not set forth the facts in sufficient detail for the Court to identify with particularity the issues that would be before the Court if it grants certiorari.

[2] Hull also sued a whole array of entities that included the name "Prudential," but which had nothing to do with this case.

infarction and other medical conditions. He did not allege that he could not afford the thallium stress test if PruCare did not pay for it. Indeed, in an affidavit filed in support of his motion to remand he affirmatively stated that he could have afforded the test even if PruCare did not pay for it.

Respondents timely removed the case to the United States District Court for the Eastern District of Missouri on federal question grounds. Respondents asserted that they had done no more than to deny benefits under an employee welfare benefit plan, and that the district court therefore had subject matter jurisdiction under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B).

On Hull's motion to remand the district court considered affidavits submitted by both Hull and PruCare. The district court found that the evidence did not support Hull's contention that Dr. Fallon acted as a treating physician. "Dr. Fallon did not prescribe treatment for Hull, he merely identified what treatment would be paid for by Hull's benefit plan." (Petitioner's Appendix, p. 15a.) The district court denied Hull's motion to remand.

The district court also granted Prudential's motion to dismiss on the ground that Hull's substantive claims were preempted by ERISA §514(a), 29 U.S.C. §1144(a), and it gave Hull leave to amend. (Petitioner's Appendix, p. 16a.) Hull declined to amend,[3] and he appealed the denial of his motion to remand. The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court. (Petitioner's Appendix, pp. 1a-8a.)

---

[3] There is no suggestion in this case that Prudential breached a fiduciary duty by providing financial incentives for Dr. Fallon to refuse to precertify medically necessary procedures.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

Hull's Petition for Certiorari advances three arguments, or perhaps suggestions, as to why the Court should issue its writ of *certiorari* in this case: (1) a conflict among the various courts of appeal (Petition for *Certiorari*, pp. 5-7); (2) a failure by the Eighth Circuit to follow the relevant decisions of this Court (Petition for *Certiorari*, pp. 5-7); and (3) the presence of an important federal question that has not been but should be decided by this Court (Petition for *Certiorari*, pp. 8-10). As more fully developed below, none of these arguments or suggestions are well founded.

In his Petition for *Certiorari* Hull expresses the question presented by this case inexactly. A more precise phrasing of the issue is:

> Can a claim that is in fact based upon a denial of benefits under an employee welfare benefit plan be properly removed to federal court, even if the state court pleadings purport not to state a federal claim?

The case thus involves the so-called "well-pleaded complaint" rule announced by this Court in cases such as *Gully v. First National Bank*, 299 U.S. 109 (1936), and *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908), as well as the "complete preemption" exception to that rule recognized by this Court in cases such as *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), and *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968).

I. No Conflict Exists Among the Circuits.

Hull suggests that the decision of the Eighth Circuit in this case conflicts with two decisions of the Third Circuit, *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3rd Cir.), *cert. denied*, 516 U.S.

1009 (1995), and *In re U.S. Healthcare, Inc.*, 193 F.3d 151 (3rd Cir. 1999). This suggestion is incorrect; a review of the differences between the facts in those cases and the facts of this case demonstrates that their holdings are consistent.

Two cases decided by the Seventh Circuit demonstrate the lack of conflict in the decisions of the various circuits dealing with preemption of claims of medical malpractice under ERISA. In *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995), the employee benefit plan was a group insurance contract that paid for medical treatment from designated providers. A designated provider treated the plaintiff. Claiming that the provider was negligent, the plaintiff sued the provider, and also sued the insurer on a *respondeat superior* theory. The Seventh Circuit held that the case was improperly removed from state court, because it did not involve a determination of benefits and therefore was not within the scope of ERISA § 502(a).

A few months later, the same court decided *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996). In *Jass*, a utilization review nurse employed by PruCare determined that inpatient physical therapy was not medically necessary for the plaintiff following knee surgery, and PruCare refused to agree to pay for such therapy. The plaintiff sued both the nurse and PruCare in state court, alleging medical malpractice on the part of the nurse. The nurse filed an uncontradicted affidavit that her only contact with the plaintiff was as a utilization review administrator. The Seventh Circuit distinguished *Rice* and held that the case had been properly removed. *Jass*, unlike *Rice*, involved a denial of benefits, and therefore was within the scope of ERISA § 502(a).

In this case, the district court found that Hull's claim was based on a denial of benefits and therefore was properly removed. Based on the affidavits filed with it, the district court found that Hull's claim was like the claim in *Jass* rather than like the claim

in *Rice:* "Dr. Fallon did not prescribe treatment for Mr. Hull, he merely identified what treatment would be paid for by Mr. Hull's benefit plan."[4] (Petitioner's Appendix, p. 15a.) The Eighth Circuit agreed and affirmed. (Petitioner's Appendix, p. 8a.)

The decision of the Eighth Circuit, however, does not conflict with the decisions of the Third Circuit in *Dukes v. U.S. Healthcare, Inc.*, and *In re U.S. Healthcare, Inc.* There are two significant differences between this case and those cases.

First, in this case the district court had before it uncontroverted affidavits that supplemented and contradicted the facts alleged in the state court pleadings. Those affidavits established that Dr. Fallon was not Hull's treating physician, and that Dr. Fallon did no more than to refuse to agree in advance for PruCare to pay the costs of a thallium stress test. The district court so found, and its findings are not clearly erroneous.

The opinions in the Third Circuit cases do not refer to any explicit factual findings based on affidavits such as those in this case. Apparently, the Third Circuit based its decisions solely on the contents of the state court pleadings. There is little room for departure from the "well-pleaded complaint" rule in such a case.

Second, the Third Circuit did not involve a denial of benefits. They involved no disputes as to what care the participants were entitled to receive. Rather, they involved disputes as to whether the treatment that the participants were undisputedly entitled to receive had been negligently given. Both of those Third Circuit cases fall on the *Rice* side of the line between *Jass* and *Rice*. Indeed, the Third Circuit recognized that line in *In re U.S. Healthcare, Inc.*

---

[4] On appeal, Hull did not challenge the factual findings of the district court.

> As an administrator overseeing an ERISA plan, an HMO will have administrative responsibilities over the elements of the plan, including determining eligibility for benefits, calculating those benefits, disbursing them to the participant, monitoring available funds, and keeping records. As we held in *Dukes*, claims that fall within the essence of the administrator's activities in this regard fall within section 502(a)(1)(B) and are completely preempted.

193 F.3d at 162.

There is a clear conceptual distinction between (a) denying benefits on the ground that they are not "medically necessary" (as in *Jass*), and (b) providing substandard medical care (as in *Rice*). As the Third Circuit noted in *In re U.S. Healthcare, Inc.*, it may be difficult to apply this distinction to the facts in some cases, particularly when the same organization has acted both as plan administrator and as a provider of medical services. *Id.* at 162.

This case, however, is not such a case. In this case the district court found as a fact that PruCare did not act as a provider of medical services. Its obligation was to pay for those services that were "medically necessary" and that were provided by others. In this case there is an explicit finding by the district court, based on an uncontroverted affidavit, that Dr. Fallon did no more than refuse to agree in advance that PruCare would pay for a thallium stress test. Even in the Third Circuit this case would have been properly removed.

In short, this case presents no conflicts in the decisions of the various circuits. Those decisions can be readily harmonized by the distinction recognized by the Seventh Circuit in *Jass*.

II. The Eighth Circuit Followed the Relevant Decisions of This Court.

The Eighth Circuit did not "ignore" the recent cases decided by this Court as suggested by Hull. None of the cases cited by Hull (except *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987)) deal with "complete preemption" under ERISA §502(a). Rather, they are all cases concerned with the scope of the "relate to" clause of ERISA §514(a). Here the Eighth Circuit followed *Metropolitan Life Insurance Co. v. Taylor.* It quite properly did not interpret *California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.,* 519 U.S. 316 (1997), or any of the other cases cited by Hull, as overruling *Metropolitan Life Insurance Co. v. Taylor* or as significantly limiting that decision. This case is simply not one in which the Eighth Circuit "has decided an important federal question in a way that conflicts with the relevant decisions of this Court."

III. There Is No Need for a Decision by this Court.

This is not a case in which a decision by an administrator of an ERISA plan deprived a participant of medically necessary diagnostic procedures. Hull admitted in a sworn affidavit that he could have paid for a thallium stress test even if PruCare did not agree to pay for it. His decision to forego that test did not result from financial compulsion.

Moreover, the distinctions made by the Seventh Circuit in *Rice* and *Jass*, and followed by the Eighth Circuit in this case, are sound. When an administrator of an ERISA plan does no more than refuse to precertify a proposed medical procedure, it has done no more than deny benefits. The participant who believes he is entitled to those benefits has an express cause of action under ERISA §502(a), and that cause of action preempts any state law claims. If, however, an employee benefit plan undertakes itself to provide medical services, it may be held to the

same standard as any other medical practitioner — if it leaves a sponge in a patient's abdomen after surgery, it may be held liable. This distinction provides a sensible accommodation between: (a) the interests of the states in regulating the quality of medical services provided to its citizens; and (b) the federal policies favoring both the protection and encouragement of employee welfare benefit plans and national uniformity in the laws and regulations applicable to such plans. Certainly Hull offers no meaningful arguments against this solution that has been worked out by the lower federal courts.

CONCLUSION

For all the foregoing reasons, the Court should decline to issue its writ of certiorari in this case.

RICHARD J. PAUTLER
Counsel of Record
LEWIS R. MILLS
THOMPSON COBURN LLP
One Mercantile Center
St. Louis, MO 63101
Phone (314) 552-6000

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-1083

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY HULL,

Petitioner,

v.

RICHARD H. FALLON, M.D.
PRUDENTIAL HEALTHCARE SYSTEM, INC., et al.,

Respondents.

BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, ARKANSAS, DELAWARE, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PUERTO RICO, RHODE ISLAND, TEXAS and UTAH IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
Counsel of Record
RONALD MOLTENI
Assistant Attorney General
ERIC M. WALTER
Assistant Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102-0899

23pp

Mike Moore
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Frankie Sue Del Papa
Attorney General of Nevada
100 N. Carson St.
Carson City, Nevada 89701

Jan Graham
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

Patricia A. Madrid
Attorney General of N.M.
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Michael F. Easley
Attorney General of North Carolina
114 West Edenton St.
Raleigh, North Carolina 27602

Heidi Heitkamp
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, North Dakota 58505-0040

Angel E. Rotger Sabat
Attorney General of Puerto Rico
P.O Box 9020192
San Juan, Puerto Rico 00902-0192

Sheldon Whitehouse
Attorney General of Rhode Island
150 South Main St.
Providence, Rhode Island 02903

QUESTION PRESENTED

Whether § 502(a) of ERISA completely preempts a patient's state medical malpractice claim against his managed care organization and its medical director when the claim is based on the medical director's decision to deny coverage for the treatment prescribed by the patient's treating physician because the medical director, after consulting with the patient's treating physician, concluded that the treatment was not "medically necessary."

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. This Court has recognized the confusion created by ERISA's dual preemption scheme and has differentiated between the tests to be used under that scheme 5

II. By going beyond the language of ERISA § 502(a) and the test defined for that section by this Court in *Metropolitan Life Ins. Co. v. Taylor*, the Eighth Circuit has increased the level of confusion and threatened to carry preemption well beyond the scope of the congressional mandate 7

III. This Court's voice is required to silence the cacophony of disparate circuit court decisions interpreting, applying, and often confusing, the two forms of ERISA preemption 10

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **Page**

Board of Trustees of the Hotel and Restaurant Employees Local 25 v. Madison Hotel, Inc., 97 F.3d 1479 (D.C. Cir. 1996) 14

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519 U.S. 316 (1997) 6

Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114 (10th Cir. 1991) 12

Custer v. Sweeney, 89 F.3d 1156 (4th Cir. 1996) 12

Danca v. Private Health Care Systems, Inc., 185 F.3d 1 (1st Cir. 1999) 8, 13

Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3rd Cir. 1995) 13

Emard v. Hughes Aircraft Co., 153 F.3d 949 (9th Cir. 1998) 12, 13

Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) . . . 14

Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 50 F.3d 144 (2nd Cir. 1995) 12

Heimann v. National Elevator Industry Pension Fund, 187 F.3d 493 (5th Cir. 1999) 6, 12

Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999) 9-11

In re U.S. Healthcare, Inc., 193 F.3d 151
(3rd Cir. 1999) 8

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990) 8, 9

Jass v. Prudential Health Care Plan, Inc.,
88 F.3d 1482 (7th Cir. 1996) 10-12

Lupo v. Human Affairs International, Inc.,
28 F.3d 269 (2nd Cir. 1994) 12

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 6

Metropolitan Life Ins. Co. v. Taylor,
481 U.S. 58 (1987) . . . . . passim

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 7, 8

*Prudential Ins. Co. of America v. National Park
Medical Center, Inc.*, 154 F.3d 812
(8th Cir. 1998) 6

Rice v. Panchal, 65 F.3d 637 (7th Cir. 1995) . . 8, 11, 12

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 5

Sutton v. Facey, 1 Mich. 243,
1849 WL 1906 (Mich. 1849) 1

Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998) . . . 13

UNUM Life Ins. Co. of America v. Ward,
119 S.Ct. 1380 (1999) 2

Warner v. Ford Motor Co., 46 F.3d 531
(6th Cir. 1995) 13

Whitt v. Sherman International Corp.,
147 F.3d 1325 (11th Cir. 1998) 14

STATUTES AND REGULATIONS

28 U.S.C. 1331 § (1994) 14

29 U.S.C. § 1132(a) . . . . . passim

29 U.S.C. § 1144(a) . . . . . passim

Employee Retirement Income Security Act (ERISA),
29 U.S.C. § 1001, et seq. 2

INTEREST OF AMICI CURIAE

Amici curiae, the undersigned Attorneys General of the States of Missouri, Arkansas, Delaware, Illinois, Iowa, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, Puerto Rico, Rhode Island, Texas and Utah support the petition of Jeffrey Hull for a writ of certiorari. Like Hull, a substantial portion of the citizens in the *amici's* states receive health care through their employers' health plans provided by managed care organizations ("MCOs"). With regard to medical services provided by physicians, paid for by employers or otherwise, states use two tools to protect public health: the proactive tool of licensing, an effort to ensure that physicians have and maintain skills and knowledge; and the reactive tool of common law tort remedies, an effort to redress injuries caused by physicians' failure to properly apply their skills and knowledge. Those tools have been the province of state law and regulation for more than 150 years. *See, e.g.*, *Sutton v. Facey*, 1 Mich. 243, 1849 WL 1906, *4 (Mich. 1849) ("In most of the older states at an early period the statutes required that any one practicing as a physician should first obtain a license either from some state board of medical censors (as in Massachusetts, under the statute of 1818) or from some university or medical college (as in Alabama, under act of 1854)." Though the licensing requirement in Michigan was repealed in 1844, "every person assuming to practice was liable for damages in case of malpractice."). Given the dramatic expansion of managed care during the last decade, the question of the utility of those tools in the managed care environment is of vital interest to the *amici* states.

The U.S. Court of Appeals for the Eighth Circuit held that in the circumstances alleged here -- where a medical doctor acting as a prospective utilization reviewer (a

"physician-reviewer") for an MCO made a medical decision, *i.e.*, whether a particular treatment was medically necessary -- the state is preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*, from using tort law as a tool to protect its citizens. Such holdings have been asserted by physicians as defenses against actions against their licenses, on the premise that when a reviewer-physician decides what is "medically necessary," he is making an insurance coverage decision and not a medical decision. But actually, he is exercising his medical expertise while "consult[ing] with other physicians and surgeons." *Id.*[1]

Only the states in the Eighth Circuit are directly affected by that court of appeals' specific holding. But all states are affected by the confusion that it creates, both intrinsically, by confusing two different types of preemption, and extrinsically, for the Eighth Circuit holds that preemption is determined under a different, broader test than the ones used by other courts of appeals and by this Court. Assuming that under the Eighth Circuit's jurisprudence there is still a state role in determining how to relieve the ills caused by insurance company physicians who make medical decisions, the states cannot discern from existing caselaw where that role begins and ends. Indeed, the confusion and contradiction created by the varying statements of ERISA preemption in this area inhibit the states from addressing perceived problems in the provision of medical care, whether the proposed solutions come in the form of tort reform, licensing changes, or the creation of alternative remedies.

---

[1] The States have also traditionally regulated the business of insurance. But unlike *UNUM Life Ins. Co. of Am. v. Ward*, 119 S.Ct. 1380, 1390-91 n. 7 (1999), this case does not involve ERISA's insurance savings clause.

That is one of the reasons that the Solicitor General was right when he recently told this Court that "questions regarding the scope of ERISA preemption of negligence claims against MCOs are currently of great nationwide importance." Brief for the United States as Amicus Curiae in *United States Healthcare Systems of Pa. v. Pennsylvania Hospital Ins. Co., petition for cert. filed*, No. 98-1836, at 6 ("*USHC*/US brief"). The issues of concern to the *amici* states cannot be resolved -- and thus the states' frustration cannot be addressed -- in either *United States Healthcare Systems* or *Pegram v. Herdrich, petition for cert. filed*, No. 98-1949.[2] Neither of those cases involves the ERISA provision at issue here, § 502(a). 29 U.S.C. § 1132(a) (1997). As the Solicitor General recently pointed out, again in his brief in *United States Healthcare*, "this Court has never delineated the boundaries of the preempted field in the context of health care benefits" under § 502(a). *USHC*/US brief at 15.

Moreover, in *United States Healthcare*, the Pennsylvania Supreme Court never suggested that the MCO exercised any medical judgment. The MCO said *where* the patient could be treated. Here, the MCO said *how*: through one type of medical test (determined by the physician-reviewer) rather than another (determined by the attending physician). The patient was told by the MCO physician-reviewer not just that a particular procedure was not covered, but that the procedure was not medically necessary. It is the

---

[2] In addition to *United States Healthcare* and *Pegram*, the states' interest here is also similar to their interest in two tort preemption cases already on this Court's docket, *Geier v. American Honda Motor Co. Inc.*, No. 98-1811 (argued December 7, 1999), and *Norfolk Southern Rwy. Co. v. Shanklin*, No. 99-312 (to be argued March 1, 2000).

exercise of medical judgment by the physician-reviewer that makes this case of such great concern to the states as they pursue efforts to protect the public health.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on interpretation and application of § 502(a), *not* of § 514 of ERISA. It addresses the meaning of the leading § 502(a) decision, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987). There this Court announced that "causes of action within the scope of the civil enforcement provisions of § 502(a)" are removable to federal court and, once there, are completely preempted. *Id.* at 66. Simply stated, that is the test to determine if a given state law claim is completely preempted. But post-*Taylor* decisions by the lower courts have raised two distinct concerns. First, some circuit courts, including the Eighth Circuit Court of Appeals, have gone beyond *Taylor*, applying their own, broader tests to determine if a given state law claim is completely preempted. Second, even those circuits that have stayed within the framework set out by the statute and by *Taylor* have encountered great difficulty in defining exactly what state law claims fall "within the scope of the civil enforcement provisions of § 502(a)." Because of this confusion, some avenues of relief are open in one circuit and closed in another. Or to put it in the terms applicable to the *amici* states, some states can still regulate in some areas (or at least litigate that question in state court), while others cannot.

When relief in state courts and under state laws is improperly foreclosed, physician-reviewers and MCOs can make medical decisions without concern for tort liability. The health and welfare of MCO members are then compromised when MCOs pursue cost-cutting measures aimed at increasing profit. By issuing an opinion that

clarifies the precise scope of complete preemption, this Court can free the states either to retain and enforce existing protections for their citizens, or to search for new mechanisms that fall outside a more clearly defined preemption boundary.

ARGUMENT

I. This Court has recognized the confusion created by ERISA's dual preemption scheme and has differentiated between the tests to be used under that scheme.

Among the more complex and pervasive statutes in American history, ERISA has engendered significant litigation aimed at interpreting its provisions. Conspicuous among the causes of ERISA litigation are the law's two preemption provisions, §§ 502(a) and 514. 29 U.S.C. §§ 1132(a) and 1144(a). Those provisions invoke the two general types of state law preemption: complete preemption and conflict preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The more extraordinary type, complete preemption, results when Congress expressly occupies a particular field, thereby preempting any state law falling within that field. *Id.* That type of preemption is dealt with in § 502, at issue here. Conflict preemption occurs when a state law conflicts with federal law so as to preclude compliance with both state and federal law, or where state law prevents the accomplishment of Congress's purposes and objectives in creating the federal law. *Id.* That type of preemption is dealt with in § 514, not at issue here.

Unfortunately, the line between the two provisions and their proper applications is far from clear. Thus the confluence of those two provisions has combined with the general complexity of ERISA to create great confusion in

their application, a fact not lost on the courts of appeals. *E.g., Prudential Ins. Co. of Am. v. National Park Med. Center, Inc.*, 154 F.3d 812, 815 (8th Cir. 1998) ("The precise scope of ERISA preemption of state law has left courts, including the Supreme Court, deeply troubled."); *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 499 (5th Cir. 1999) ("[C]onfusion arises in distinguishing between the 'complete preemption' . . . which creates federal removal jurisdiction and the more common ordinary preemption which does not.").

This Court is aware of this confusion and has repeatedly addressed specific areas of concern. *See California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 334-35 (1997) ("Since ERISA was enacted in 1974, this Court has accepted certiorari in, and decided, no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA pre-emption of various sorts of state law. The rate of acceptance, moreover, has not diminished (we have taken two more ERISA pre-emption cases so far this Term), suggesting that our prior decisions have not succeeded in bringing clarity to the law."). Unfortunately the language Congress employed in drafting these provisions prevents simple resolutions. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Nonetheless, this Court's opinions have provided a framework to aid the lower courts' interpretation of ERISA preemption.

That framework necessarily follows the statutory scheme, *i.e.*, it contemplates two types of preemption, with overlapping but not concurrent coverage. This Court endeavored to clarify the relative application of the ERISA preemption provisions in two opinions issued 13 years ago, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Ins. Co. v. Taylor*. In *Pilot Life*, the Court

confirmed its prior opinions holding that § 514 conflict preemption swept expansively across a wide body of state law. 481 U.S. at 47. While in *Pilot Life* the Court discussed § 502(a) preemption as well, *Taylor* represents its primary interpretation of that provision. There the Court was faced with a situation much like Hull's: the petitioner had filed state law claims that were removed on the basis of federal question jurisdiction under § 502(a). 481 U.S. at 61. *Taylor* provided this Court's most cogent opinion to date distinguishing ERISA's preemption sections. Unfortunately, not just the complexity of ERISA, but the rapid changes in and increasing complexity of health care financing have lead to causes of action that evade proper resolution under *Taylor's* limited holding.

II. By going beyond the language of ERISA § 502(a) and the test defined for that section by this Court in *Metropolitan Life Ins. Co. v. Taylor*, the Eighth Circuit has increased the level of confusion and threatened to carry preemption well beyond the scope of the congressional mandate.

In *Taylor*, this Court began by acknowledging that standing alone, ERISA § 514 conflict preemption did not convert a state law claim into an action arising under federal law. *Id.* at 64. Rather, a state law claim may not be removed to federal court unless it falls within the scope of § 502(a)'s civil enforcement provisions. *Id.* at 66. While this decision clarified some issues, it left unanswered a litany of questions. Chief among them was the scope of § 502(a)'s civil enforcement provisions. *See Rice v. Panchal*, 65 F.3d 637, 641 (7th Cir. 1995) ("[T]he precise boundaries of § 502(a)'s complete preemption are not clear."). The opinion also created ambiguity regarding whether removal is proper without also finding § 514 conflict preemption. *See*

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990). Courts of appeals for various circuits have resolved these questions with novel and inconsistent interpretations of *Taylor* and *Pilot Life*. The decision of the Eighth Circuit in this case is the most recent, and a very problematic contribution to that set of inconsistent interpretations.

Of course, there would be no federal jurisdiction over Hull's claims absent a finding that removal was proper under § 502. The Eighth Circuit, then, was obligated to begin by determining whether it had subject matter jurisdiction. *Danca v. Private Health Care Systems, Inc.*, 185 F.3d 1, 4 (1st Cir. 1999) ("A threshold matter in this case, as in every case, is subject matter jurisdiction."); *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 158 (3rd Cir. 1999), *petition for cert. filed*, No. 98-1836. Because the absence of subject matter jurisdiction would preclude any findings on the merits, the logical course is to first examine § 502(a) complete preemption. *Danca*, 185 F.3d at 4. Thus, if federal court jurisdiction is asserted under § 502, the court must first determine whether the plaintiff's state law claim falls within the scope of that provision -- specifically, whether the claim is within the scope of § 502(a)'s civil enforcement provisions. *Taylor*, 481 U.S. at 66.

In deciding *Hull*, the Eighth Circuit began by acknowledging its obligation to first resolve the jurisdiction question. Unfortunately, the court then confused ERISA's preemption provisions. The Eighth Circuit began by referring to *Ingersoll-Rand Co. v. McClendon* for the proposition that ERISA's preemption clause is broadly worded to establish pension plan regulation as a federal concern. *Hull v. Fallon*, 188 F.3d 939, 942 (8th Cir. 1999). But in that portion of its opinion in *McClendon*, this Court was exploring the breadth not of § 502 or its civil enforcement provisions, but of § 514 conflict preemption. Nothing in *McClendon* suggests that its

discussion of § 514 should guide the lower courts in deciding whether claims brought up on removal are within the scope of § 502(a)'s civil enforcement provisions. *See McClendon*, 498 U.S. at 137-38.

The Eighth Circuit's purpose in examining § 514's preemptive breadth became evident when it announced its new test for finding complete preemption and removal jurisdiction. The Eighth Circuit held that "[c]auses of action within the scope of, *or that relate to*, the civil enforcement provisions of 502(a) are removable to federal court despite the fact the claims are couched in terms of state law." *Hull*, 188 F.3d at 942 (emphasis added). Adding the words, "or that relate to," the Eighth Circuit's test amounts to an indelicate merger of § 502(a)'s complete preemption analysis (which does not include the "relate to" language) and § 514's conflict preemption standard (which does). Such a merger is a departure from the language of the statute and from the holding in *Taylor* -- a departure that increases confusion as to ERISA preemption, reduces the ability of the states to protect the health and welfare of their citizens, goes beyond the scope of preemption expressly mandated by Congress, and merits this Court's review.

III. This Court's voice is required to silence the cacophony of disparate circuit court decisions interpreting, applying, and often confusing, the two forms of ERISA preemption.

The Eighth Circuit's confusion of § 502(a) and § 514 is symptomatic of the greater problem with applying ERISA's preemption provisions, especially in the context of medical decisions of the sort usually subject to state, rather than federal regulation. The test in the statute, reiterated but

perhaps not explained with enough detail in *Taylor*, has proven to be a source of great inconsistency and confusion.

Though the ultimate question must be "what claims fall within the scope of § 502(a)'s civil enforcement provisions?" (*Taylor*, 481 U.S. at 66), the lower federal courts have posed that question in varying forms and have defined disparate tests for answering it -- leading to inconsistent results. Thus each case begins when a plaintiff has filed a state law claim in state court against an entity purporting to be protected by ERISA's provisions. Then the defendant removes the matter to federal court. But the next step varies according to the circuit. In fact, in two circuits, different panels have taken different approaches.

One is the Seventh Circuit. The second case there is the one most factually similar to *Hull - Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996). There an ERISA plan participant brought a state law negligence claim against the utilization reviewer and the MCO that serviced the plaintiff's ERISA plan, alleging negligence in the utilization reviewer's decision to deny certain post-surgery physical therapy on the basis that it was not medically necessary. The Seventh Circuit looked at three factors to determine whether the plaintiff's claim was completely preempted:

> (1) whether the plaintiff is eligible to bring a claim under ERISA § 502(a);
>
> (2) whether the plaintiff's cause of action falls within the scope of an ERISA provision that the plaintiff can enforce via § 502(a); and

> (3) whether the plaintiff's state law claim cannot be resolved without an interpretation of the contract governed by federal law.

Id. at 1487. As in *Hull*, the Seventh Circuit found complete preemption. But though the outcome was the same, the test was markedly different: Nothing in the *Jass* test suggests that the Seventh Circuit would find that state law claims are preempted merely because they "relate to," rather than "fall within the scope of," § 502(a)'s civil enforcement provisions.

In a prior case, the Seventh Circuit used a different test -- though still one that does not read "relate to" into the statute. In *Rice v. Panchal*, 65 F.3d 637, 641 (7th Cir. 1995), the court of appeals explored in depth the differences between ERISA's preemption provisions. 65 F.3d at 639-641. Though the court considered all the issues discussed in *Jass* (*id.* at 641-644), the test it applied in *Rice* consisted of only the third *Jass* factor (*id.* at 644-646 ("Rice's claim . . . does not rest upon the terms of an ERISA plan, and it can be resolved without interpreting an ERISA plan. Therefore, his claim is not properly recharacterized . . . .")). Because nothing in *Jass* addresses the change from *Rice*, Seventh Circuit litigants are left confused as to the meaning of the other *Jass* factors.

Varying decisions in the Second Circuit create similar confusion. In *Lupo v. Human Affairs International, Inc.*, the court of appeals interpreted *Taylor* narrowly by considering whether Lupo's state law claims could literally be recharacterized as § 502(a) civil enforcement actions. 28 F.3d 269, 272 (2nd Cir. 1994) ("On their face, none of these claims bears any significant resemblance to those

described in § 1132(a)(1)(B)."). Consequently, the court remanded Lupo's state law claims to the district court with instructions to remand them to the state court. But just nine months later, the same circuit applied a different test to determine whether a state law claim was properly removed to federal court under § 502(a) complete preemption. *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144, 149 (2nd Cir. 1995). In *Williams Trust*, the court purported to follow *Taylor* in announcing that the test for removal was whether the state law claim (1) relates to an ERISA plan within the meaning of § 514, and (2) falls within the scope of ERISA's civil enforcement provisions in § 502(a). *Id.* The particular error committed in *Franklin* is often repeated. *See Custer v. Sweeney*, 89 F.3d 1156, 1165 (4th Cir. 1996); *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 502; *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 953 (9th Cir. 1998); *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1119 (10th Cir. 1991).

One group of circuits -- the Third, Sixth, and Ninth -- has not only avoided internal conflicts, but seems to have reached a near consensus. *See Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355-56 (3rd Cir. 1995); *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6th Cir. 1995); *Toumajian v. Frailey*, 135 F.3d 648, 655 (9th Cir. 1998). *Cf. Emard*, 153 F.3d at 953. These courts have applied § 502(a) preemption narrowly, demonstrating reluctance to indiscriminately apply the extraordinary preemptive force that accompanies complete preemption. In doing so, these courts have simply asked whether the state law claims seek the same relief available under § 502(a). *See, e.g., Dukes*, 57 F.3d at 356 ("The plaintiffs here simply do not claim that the plans erroneously withheld benefits due. Nor do they ask the state courts to enforce their rights under the terms of their respective plans or to clarify their rights to future benefits.").

None of those holdings are compatible with the Eighth Circuit's insertion of "relate to" into § 502.

The First Circuit asks a question that amounts to a similar standard, though it could be read more broadly than the questions posed in the Third, Sixth, and Ninth Circuits. In *Danca v. Private Health Care Systems, Inc.*, the court held that a state cause of action is within § 502(a)'s scope when the state law "can be properly characterized as an 'alternative enforcement mechanism' of ERISA § 502(a) or of the terms of an ERISA plan." 185 F.3d at 5. But even that conclusion is not as broad as the one reached by the Eighth Circuit.

The Eleventh Circuit appears to apply the proper standard, despite failing to identify the correct test from *Taylor*. In *Whitt v. Sherman International Corp.*, the court simply held that state law claims seeking relief available under ERISA are recharacterized as ERISA claims and therefore arise under federal law. 147 F.3d 1325, 1329 (11th Cir. 1998). This evolutionary step may be supported by the observation in *Taylor*, quoting § 502(f), that "the district courts . . . shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action." 481 U.S. at 65. But like the holdings in the First, Second, Third, Sixth, Seventh, and Ninth Circuits, it does not go as far as the Eighth Circuit demands.[3]

---

[3] By contrast, the D.C. Circuit may have gone beyond the Eighth Circuit. *Board of Trustees of the Hotel and Restaurant Employees Local 25 v. Madison Hotel, Inc.*, 97 F.3d 1479, 1484 (D.C. Cir. 1996) ("[A] state-law based complaint which 'relate[s] to [an] employee benefit plan' under section 514(a) of ERISA . . . such that the complaint is preempted by ERISA, is 'necessarily federal in character by virtue of the clearly manifested intent of Congress,' and therefore 'arise[s] under the laws . . . of the United States' for

Perhaps the internal differences in and among the circuits are caused in part by the mixed signals some might see in this Court's decision in *Taylor*. At one point, the Court suggested that removal under § 502 could only occur if the claim was also conflict preempted under § 514, *i.e.* the claim "related to" an ERISA plan. 481 U.S. at 64, *citing Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Tr. for S. Calif.*, 463 U.S. 1, 25-27 (1983). Ultimately, this Court chose not to take a step down that road, holding instead that ERISA complete preemption applied simply to "causes of action within the scope of the civil enforcement provisions of § 502(a)." 481 U.S. at 66. Nonetheless, the absence of any definition of the "causes of action within the scope of the civil enforcement provisions of § 502(a)" has left plenty of room for variation.

Whether state law claims like Hull's are completely preempted or remain viable and must be remanded to state court is a question that arises more and more often as managed care continues to expand through the American health care system. And the answer will vary according to which state has jurisdiction -- one in the Eighth, or one a circuit that has drawn ERISA preemption more narrowly. That variability will continue, and its significance will grow, absent a definitive holding as to whether the apparently common facts stated here state a "cause[] of action within the scope of the civil enforcement provisions of § 502(a)" (481 U.S. at 66).

CONCLUSION

---

purposes of original federal subject matter jurisdiction under 28 U.S.C. § 1331 (1994)."). Certainly that court's approach is different than the more limited one used in the other circuits discussed.

Though ERISA § 502(a) may be the exclusive remedy for rights guaranteed under ERISA, no provision in ERISA safeguards plan participants' right to quality medical care. This Court should hear this case to decide whether, and to what extent, the states have a role in safeguarding patients against MCO physician-reviewers who overrule a treating physician's conclusion that a particular procedure is not "medically necessary."

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
Counsel of Record
RONALD MOLTENI
Assistant Attorney General
ERIC M. WALTER
Assistant Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102-0899